Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

AARATHI DESAIGOUDAR, as Trustee of the Chan Desaigoudar Foundation, a California Charitable Trust
Petitioner,

v.

WADE MEYERCORD, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a court fashion an immateriality exemption to disclosures required by the Securities and Exchange Commission's (SEC) Regulation S-K, thereby excusing, in a proxy solicitation, a lie as to a director-candidate's other directorships?

PARTIES TO THE PROCEEDING

Petitioner

Aarathi Desaigoudar, as Trustee Of The Chan Desaigoudar Charitable Foundation, a California Charitable Trust. The Foundation has no parent company or subsidiary.

Respondents

Wade Meyercord, Scott Hover- Smoot, Angel Jordan, Jeffrey Kalb, C. Kumar Patel, Stuart Schube, John Sprague, and John Trewin.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 8

APPENDIX

Appendix A
Ninth Circuit Opinion, 9/8/00 . . . . . 1a

Appendix B
District Court Order Granting Defendants' Motion to Dismiss, 10/16/98 . . . . . 16a

Appendix C
Ninth Circuit Order Denying Rehearing, 12/22/00 . . . . . 27a

TABLE OF AUTHORITIES

Cases

Mills v. Electric Auto-Lite, Co.,
396 U.S. 375 (1970) 7

Stahl v. Gibralter Financial Corp.,
967 F.2d 335 (1992) 6

TSC Industries, Inc. v. Northway, Inc.,
426 U.S. 438 (1976) 6, 7

Statutes

Section 14(a) of the Securities Exchange Act
of 1934, 15 U.S.C. § 78n(a) 3, 5, 7

15 U.S.C. § 80a-1, et seq. 4

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(c) 2

17 C.F.R. Part 229
Standard Instructions for Filing Forms
Under Securities Act of 1993, Securities
Exchange Act of 1934 And Energy
Policy and Conservation Act of 1975--
Regulation S-K . . . . . i, 3, 6, 7, 8

17 C.F.R. § 229.401(e)(2)
Directors, Executive Officers,
Promoters and Control Persons;
Business Experience –Directorships 3-4, 7

17 C.F.R. § 240.14a-9
False or Misleading Statements 6, 7

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 223 F.3d 1020 (9th Cir. 2000). A copy of the Opinion is Appendix A at 1a-15a. The unpublished Opinion of the District Court for the Northern District of California was entered on October 16, 1998, and is Appendix B at 16a-26a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its Opinion on September 8, 2000. On November 8, 2000, Petitioner filed a Petition for Rehearing and for Rehearing *En Banc* which the United States Court of Appeals denied on December 22, 2000 (App. C at 27a-28a).[1] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. 28 U.S.C. § 2101(c). The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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[1]Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari, pursuant to Supreme Court Rule 14(i).

STATUTORY PROVISIONS INVOLVED

Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), Proxies:

> Solicitation of proxies in violation of rules and regulations
>
> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 781 of this title.

17 C.F.R. Part 229, Standard Instructions for Filing Forms Under Securities Act of 1933, Securities Exchange Act of 1934 and Energy Policy and Conservation Act of 1975--Regulation S-K.

Subpart 229.401(e)(2) thereof -- Directors, Executive Officers, Promoters and Control Persons; Business Experience -Directorships:

> Directorships. Indicate any other directorships held by each director or person nominated or chosen to become a director in any company with a class of securities registered pursuant to

section 12 of the Exchange Act or subject to the requirements of section 15(d) of such Act or any company registered as an investment company under the Investment Company Act 1940. 15 U.S.C. 80a-1, et seq., as amended, naming such company.

STATEMENT OF THE CASE

The following statements are taken from the published opinion of the Ninth Circuit herein (App. A at 1a-15a) ("Opinion").

> Aarathi Desaigoudar, in her capacity as trustee of the Chan Desaigoudar Charitable Foundation (the "Foundation") sued officials of the California Micro Devices Corporation ("CMD") in 1997 for securities fraud [a lie in a proxy solicitation]. (App. A at 3a.)
>
> CMD sells microprocessors and related products. Its sales revenues reached $33 million in 1997. (App. A. at 4a.)
>
> CMD held its 1995 Annual Shareholder Meeting on September 15th . . . . The agenda included the re-election of the individual [Respondents] and a vote on a stock option plan for their benefit. A proxy solicitation in anticipation these votes had been previously posted on June 12th , and a press release had followed on July 27th . (App. A at 5a.)
>
> The [second amended] complaint alleges that [Respondents] . . . misrepresented [Respondent] Jordan's qualifications for re-election as a director of CMD. (App. A at 7a.)

The Opinion below states the issue (App. at 13a-14a):

> The second amended complaint further alleges that Appellees violated Section 14(a) when they falsely held out Jordan as a director of Keithley Instruments, Inc. ("Keithley"). However, the complaint does not suggest that Appellees' statements about Jordan and Keithley were material misrepresentations. There are, in other words, no facts to support the inference that it was substantially likely that a reasonable CMD shareholder would have considered the nature of Jordan's relationship with Keithley important in deciding how to vote. Since there can be no Section 14(a) liability without materiality, this allegation is defective. *See TSC Industries [Inc. v. Northway, Inc.]*, 426 U.S. [438] at 449 [(1976)], *Stahl [v. Gibralter Financial Corp.]*, 967 F.2d [335] at 337 [(1992)].

In effect, the lower court held that a flat out lie as to other directorships is immaterial!

Petitioner's position is that violation of Securities Exchange Commission Regulation S-K, 17 C.F.R. Part 229, does not require a showing of materiality to state a claim for relief, even though materiality is relevant to a violation of Securities Exchange Commission Rule 14a-9, 17 C.F.R. § 240.14a-9.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit ignored the clear mandate of Congress that it is unlawful to solicit proxies, in respect of registered securities, in contravention of rules of the Securities Exchange Commission. Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), expressly delegates power to the SEC to adopt rules and regulations governing proxy solicitations. Regulation S-K, 17 C.F.R. Part 229, is such a regulation; and the SEC has therein provided *inter alia* that in the solicitation of proxies for the election of directors, the proxy must indicate other directorships held. 17 C.F.R. § 229.401(e)(2).

In this case, the joint solicitation by the slate of directors falsely claimed that candidate Jordan was a director of Keithley Instruments, Inc. The lower court excused this lie on the grounds that the "materiality" of this lie had not been alleged. (App. B at 14a.) But nothing in Section 14(a) or Regulation S-K excuses lies about employment history -- or about anything required by Regulation S-K -- on the ground of "immateriality." Nothing in Section 14(a) or Regulation S-K permits exemption from disclosing true employment history -- or exemption from any disclosure required by Regulation S-K -- on the ground of "immateriality."

The lower court relied on cases applying Rule 14a-9, rather than Regulation S-K. "Materiality" has been properly imposed by this Court as to undisclosed matters which make a proxy statement false or misleading under SEC Rule 14a-9, 17 C.F.R. § 240.14a-9. *Mills v. Electric Auto-Lite, Co.*, 396 U.S. 375 (1970); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976). In this context of Section 14(a), "materiality" is proper, because the SEC's Rule 14a-9 itself uses the word "material." But neither the SEC's Regulation

S-K, nor the particular subpart thereof upon which Petitioner relies, mentions or depends on "materiality."

A lie about another directorship violates Regulation S-K, regardless of materiality. This Court should settle the question of whether a "materiality" exemption applies to compliance with Regulation S-K.

CONCLUSION

This Petition should be granted to prevent "immaterial" lies about disclosures required by Regulation S-K.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed September 8, 2000]

No. 98-17154

AARATHI DESAIGOUDAR, as Trustee of the Chan Desaigoudar Charitable Foundation, a California charitable trust,
Plaintiff-Appellant,

v.

WADE MEYERCORD; SCOTT HOVER-SMOOT; ANGEL JORDAN; JEFFREY KALB; C. KUMAR PATEL; STUART SCHUBE; JOHN SPRAGUE; and JOHN TREWIN,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California
D.C. No. CV-97-21003-JW
James Ware, District Judge, Presiding.

Argued and Submitted: February 17, 2000
San Francisco, California

Before: Joseph T. Sneed, Mary M. Schroeder, and
A. Wallace Tashima, Circuit Judges

Opinion by Judge Sneed.

OPINION

SNEED, Circuit Judge:

The question in this appeal is whether the district court should have dismissed Desaigoudar's second amended complaint with prejudice for repeated failure to satisfy Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. § 78u-4(b). Our jurisdiction over this question is described at 28 U.S.C. § 1291. We review de novo an order dismissing a case for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). The usual practice in Rule 12(b)(6) cases is to take all well-pleaded allegations of material fact as true and construe them in the light most favorable to the plaintiff. *See id.* However, the PSLRA has modified the liberal, notice pleading standard found in the Federal Rules of Civil Procedure. *See In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, (9th Cir. 1999). Accordingly, we now examine a securities fraud complaint to determine whether the plaintiff has complied with the more stringent pleading requirements of the PSLRA. *See id.* De novo review is also appropriate when, as here, the district judge denied leave to amend. *See Franklin v. Terr*, 201 F.3d 1098, 1101 (9th Cir. 2000).

We affirm.

I.

A. Procedural History

Aarathi Desaigoudar, in her capacity as the trustee of the Chan Desaigoudar Charitable Foundation (the "Foundation"), sued officials of California Micro Devices Corporation ("CMD")[1] in 1997 for securities fraud. When Appellees moved to dismiss under Rule 12(b)(6), Desaigoudar offered an "Amended Complaint." Like the original, it alleged violations of Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rules 10b-5 and 14a-9 of the Securities Exchange Commission (the "SEC"). *See* 15 U.S.C. §§ 78j(b), 78n(a); 17 C.F.R. §§ 240.10b-5, 240.14a-9. The district court found this pleading also deficient and dismissed the Section 10(b), Rule 10b-5 claim with prejudice. However, it granted leave to amend the Section 14(a), Rule 14a-9 claim, subject to the following admonition:

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[1]The defendants (now "Appellees") were: (1) Jeffrey Kalb, President and CEO since December 1994; (2) Wade Meyercord, Chairman of the Board since October 1994; (3) C. Kumar Patel, director from 1989 to June 1996; (4) Stuart Schube, director of and consultant to CMD; (5) John L. Sprague, director of and consultant to CMD; (6) Angel Jordan, director of and consultant to CMD as well as member of CMD's compensation committee; (7) John Trewin, CFO; and (8) Scott Hover-Smoot, Secretary and corporate counsel to CMD.

> In preparing a *second amended complaint*, Plaintiff must adhere to the strict requirements of Rule 9(b) and the Private Securities Litigation Reform Act. Plaintiff's counsel must also comply with Rule 11, Fed.R.Civ.P. Repeated failure to comply with these pleading requirements will result in the dismissal of the claim, with prejudice.

Id. (citations omitted) (emphasis added).

Desaigoudar subsequently filed what the district court labeled a "Second Amended Complaint." The entire complaint was dismissed with prejudice. Desaigoudar then filed this timely appeal.

B. Factual History

CMD sells microprocessors and related products. Its sales revenues reached $33 million in 1997. As of October 1998, the Foundation owned 72,580 shares of CMD stock, which were valued at approximately $372,000.

In September 1994, CMD entered into a one-year research and development contract with CellAccess, Inc., a company involved in developing asynchronous transfer mode technology.[2] In exchange for a 56% interest in CellAccess' technology and the option to renew the contract after the year, CMD agreed to make monthly payments of $90,000. CMD

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[2]This technology facilitates the electronic transference of data, voice, and other information.

terminated these payments in April 1995 and relinquished its 56% interest. Sometime thereafter, for a reason not revealed by the record, CMD received a $1.5 million termination fee. In November 1995, CellAccess was acquired by FORE Systems, Inc. ("FORE Systems"), a Pittsburgh, Pennsylvania company. The purchase price was $60 million.

CMD held its 1995 Annual Shareholder Meeting on September 15th, prior to FORE Systems' purchase of CellAccess. The agenda included the re-election of the individual Appellees and a vote on a stock option plan for their benefit. A proxy solicitation in anticipation of these votes had been previously posted on June 12th, and a press release had followed on July 27th.[3] These materials explained that CMD had registered a quarterly profit for the first time in two years.

II.

To repeat, the second amended complaint alleges that Appellees, as officers and directors of CMD, intentionally violated Exchange Act Section 14(a) and SEC Rule 14a-9. These disallow the solicitation of a proxy by a statement that contains either (1) a false or misleading declaration of material fact, or (2) an omission of material fact that makes any portion of the statement misleading. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.14a-9. In addition, a Section 14(a), Rule 14a-9 plaintiff must demonstrate that the misstatement or

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[3]We agree with the parties and the district court that the press release was part of a continuous plan to encourage a favorable vote by shareholders and was, therefore, a proxy solicitation. *See* 17 C.F.R. § 240.14a-1.

omission was made with the requisite level of culpability and that it was an essential link in the accomplishment of the proposed transaction.[4] *See TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 444 & n.7, 48 L. Ed. 2d 757, 96 S. Ct. 2126 (1976).

The complaint clearly sounds in fraud.[5] Thus, Federal Rule of Civil Procedure 9(b) and the PSLRA require Desaigoudar to plead her case with a high degree of meticulousness. *See Yourish v. California Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999) (noting applicability of Rule 9(b) to securities fraud claims); *In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 996 (9th Cir. 1999) (describing heightened pleading standard of the PSLRA). Rule 9(b) mandates that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The PSLRA modifies Rule 9(b), providing that a securities fraud plaintiff shall identify: (1) each statement alleged to have been misleading; (2) the reason or reasons why the statement is misleading; and (3) all facts on which that belief is formed. *See In re Silicon Graphics*, 183

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[4]We decline to evaluate whether Desaigoudar has pleaded these additional elements sufficiently because we conclude that the complaint does not allege a material misstatement or omission.

[5]The district court rejected as "disingenuous" Desaigoudar's claim that the complaint also sounds in negligence. *See* Order Granting Defendants' Motion to Dismiss at 5 n.2 (Oct. 18, 1998). After carefully reviewing the complaint's language, which asserts "knowing[ ] and intentional[ ]" misconduct by the Appellees, we conclude that the rejection was proper. Second Amended Complaint at 14 (Par. 81).

F.3d at 996; 15 U.S.C. § 78u-4(b)(1). The district court found that Desaigoudar did not comply with these standards. We agree.

III.

The complaint alleges that Appellees: (1) misled shareholders when they announced a quarterly profit in CMD's proxy materials; (2) failed to disclose that Appellee Jordan had a conflict of interest; and (3) misrepresented Jordan's qualifications for reelection as a director of CMD. None of these allegations, which we shall discuss seriatim, constitutes a valid claim.

A. Allegation One: Misrepresentation of "Profit"

Desaigoudar argues that the proxy statements the Appellees issued in June and July of 1995 misled shareholders because they described CMD's quarterly performance as "profitable." In her view, the shareholders should have been told that CMD's quarterly performance was a loss. She asserts that Appellees engineered the profit, in part, when they caused CMD to cancel monthly funding for CellAccess and thereby abandoned CMD's 56 percent interest in the venture. Desaigoudar reasons from FORE Systems' November 1995 purchase of CellAccess that the cancellation and abandonment of the venture caused CMD to forego 56 percent of a $60 million opportunity, or $36 million. She then alleges that the Appellees knowingly and intentionally failed to inform shareholders that CMD had forfeited an asset worth many millions of dollars in order to generate a portion of the profit that they claimed. Her argument is flawed.

Rule 14a-9 requires a complainant to demonstrate why a challenged proxy statement was misleading "at the time . . . made." C.F.R. § 240.14a-9. Thus, the issue here is whether the Appellees could have known how much CellAccess was worth to CMD when it ceased funding for CellAccess. If there was no way to know, it is impossible to fault the Appellees. Failure to disclose information that does not yet exist cannot be the predicate for Rule 14a-9 liability. *See* 17 CFR § 240.14a-9. Obviously Desaigoudar has suspicions, but that is not enough. We can therefore eliminate FORE Systems' purchase of CellAccess as a possible source for knowledge of the company's value. That transaction, which appears to be the only exchange that actually involved CellAccess, took place several months *after* the proxy statements were issued in the summer of 1995.

Desaigoudar relies on three other reasons why the Appellees would have known CellAccess' value at the time they posted the proxy statements. They are that: (1) Appellee Jordan performed a due diligence investigation of CellAccess in 1994; (2) an unidentified "high technology publication" mentioned CellAccess as a "promising new company" in March 1995; and (3) sometime just prior to that favorable mention CISCO Systems paid $120 million for a company that, like CellAccess, was developing asynchronous transfer mode technology. We think these reasons are not enough to substantiate Desaigoudar's claim. Not one of the described events occurred contemporaneously with the proxy solicitations or CMD's cessation of the CellAccess project. There is also no indication that the Appellees knew about the "recognition" CellAccess received or about CISCO Systems' purchase of a CellAccess "competitor."

Ultimately, the greatest flaw in Desaigoudar's case is the fact that any estimate that the Appellees could have fabricated based on these events would have been utterly unreliable. The SEC has historically disfavored forecasts and value estimates in proxy statements. *See South Coast Services Corp. v. Santa Ana Valley Irrigation Co.*, 669 F.2d 1265, 1270 (9th Cir. 1982). An exception to this treatment has existed for estimates based on "objective, reasonably certain data, such as commodity prices prevailing in an active market." *See id.* at 1270-71. Here, the events upon which the complaint relies do not comprise the "objective, reasonably certain data" spoken of in the exception. Nothing in the complaint demonstrates that CellAccess was akin to a "commodity" traded in an "active market." Thus, we cannot fault the Appellees for omitting from the proxy statements an estimate based on those facts presented in the complaint. No *reasonable* shareholder would have considered such an estimate honestly presented important in deciding how to vote. Consequently, we agree with the district court that Desaigoudar failed to plead a material omission and that the Appellees are not liable under Section 14(a) and Rule 14a-9. *See TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. at 449 (noting that "an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote"); *Stahl v. Gibraltar Financial Corp.*, 967 F.2d 335, 337 (1992) (noting that materiality is the "touchstone of a Section 14(a) violation").

Broadly read, Desaigoudar's complaint would require corporate officials to speculate about the value of potentially foregone opportunities and disclose the results whenever they might dissuade shareholders from adopting by proxy the officials' recommendations. However, Section 14(a) and Rule

14a-9 do not require corporate officials to predict such distant misfortunes. *See South Coast Services Corp.*, 669 F.2d at 1270. In a note appending Rule 14a-9, the SEC identifies "predictions as to specific market values" as, depending on the facts of a particular case, possible examples of the very wrong that Rule 14a-9 was designed to prevent. 17 CFR § 240.14a-9. Since we conclude that a prediction based on the facts in the complaint would have been unreliable, we cannot conclude that omitting it from the proxy statements violated the law.

Section 14(a) and Rule 14a-9 do not obligate corporate officials to present, no matter how unlikely, every conceivable argument against their own recommendations. They instead require that officials divulge all known material facts so that shareholders can make informed choices. *See J.I. Case Co. v. Borak*, 377 U.S. 426, 431, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964) (noting that Section 14(a) was designed to "prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation"). That is what the Appellees appear to have done.

Desaigoudar protests that the gravamen of the complaint was "self-dealing" by the Appellees and their "concealed mismanagement" of CMD, not their failure to provide an estimate of CellAccess' resale value. Appellant's Opening Br. at 23. We find this interpretation unconvincing in light of the clear language of her complaint, which states: "The press release and proxy solicitation material were materially misleading as to the true general nature and terms of the quarterly profit, and as to whether Defendants merited stock options. Neither document disclosed that the modest

quarterly profit . . . meant a $36 million loss . . . ." Second Amended Complaint at 8 (Par. 48). Moreover, the complaint makes no cognizable claim under Section 14(a) and Rule 14a-9 to the extent that it might allege something other than a material misstatement or omission in connection with a proxy statement. *See, e.g., Maher v. Zapata Corp.*, 714 F.2d 436, 444 n.16 (5th Cir. 1983) (noting inapplicability of Section 14(a) to claims of alleged mismanagement or breach of fiduciary duty).

Desaigoudar also contends that the Appellees failed to alert CMD shareholders that the heralded quarterly profit was not entirely from "operations," as the investors would likely presume. In her view, what was fatally absent from the proxy solicitations was an explanation that the Appellees generated a part of the quarterly profit by eliminating CMD's ties with CellAccess. That is, they should have disclosed that some portion of the quarterly profits came from abandoning CellAccess, collecting the termination fee, and not having to pay $90,000 per month to maintain CMD's interest in CellAccess.[6]

We are unable to agree. Desaigoudar cites no authority for the proposition that the Appellees misused the word "profit." Profit may be understood properly as "gain" or "the excess of revenues over expenses in a business transaction." Black's Law Dictionary 1227 (7th ed. 1999). There is no dispute that CMD's revenue exceeded its expenses during the relevant fiscal quarter. Thus, it was not misleading to say that

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[6]Desaigoudar acknowledges that "other things" contributed to the quarterly profit. Second Amended Complaint at 8 (Par. 48).

CMD turned a profit, and Appellees were entitled to disclose that favorable information to shareholders. Desaigoudar's theory that the ordinary CMD investor would think "profit" related only to "operations" does not provide the cause of action her complaint is otherwise lacking.

B. Allegation Two: Conflict of Interest

The second amended complaint also alleges that Appellees violated Section 14(a) when they did not disclose that Appellee Jordan had a conflict of interest. Jordan served as "Director Emeritus" of the Pittsburgh High Technology Council (the "Council") while he was a director of CMD. The Council's *raison d'etre* was to lure high technology businesses away from areas like California, where CMD resides, to Jordan's home town of Pittsburgh, Pennsylvania, where FORE Systems is located. Since the complaint contains no facts demonstrating that Jordan personally or financially benefitted from FORE Systems' purchase of CellAccess, the district court concluded that there was no conflict of interest.

Desaigoudar disagrees. She claims that a conflict can exist without a personal or financial benefit to the conflicted, such as when a "director appears on both sides of a transaction." Appellant's Opening Brief at 16. In support, she cites a law review note[7] and the American Bar Association Model Business Corporation Act, Par. 8.60 (3rd ed. 1997)

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[7]Mary A. Jacobson, Note, *Interested Director Transactions and the (Equivocal) Effects of Shareholder Ratification*, 21 Del. J. Corp. L. 981, 986 (1996).

(the "Model Act"). She makes no suggestion that either authority should be controlling.

Moreover, the complaint does not indicate how Jordan's presence on the Council placed him "on both sides" of CMD's dealings with CellAccess. While suspicions might be aroused by the fact that Jordan and the president of FORE Systems served together on the Council, suspicious circumstances alone cannot satisfy Rule 9(b) or the PSLRA. *See In re Silicon Graphics*, 183 F.3d 970. The facts as Desaigoudar presents them do not suggest that Jordan arranged for CMD to terminate funding for CellAccess so that, seven months later, FORE Systems could purchase the company. In addition, the Council was not a party to and never had any financial interest in either the termination or the purchase. Jordan therefore had no discernable conflict for Appellees to disclose in CMD's June and July 1995 proxy materials.

C. Allegation Three: Misrepresentation of Jordan's Background

The second amended complaint further alleges that Appellees violated Section 14(a) when they falsely held out Jordan as a director of Keithley Instruments, Inc. ("Keithley").[8] However, the complaint does not suggest that Appellees' statements about Jordan and Keithley were material misrepresentations. There are, in other words, no

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[8]Keithley described itself as "a measurement test company." *See* Second Amended Complaint at 4 (Par. 15).

facts to support the inference that it was substantially likely that a reasonable CMD shareholder would have considered the nature of Jordan's relationship with Keithley important in deciding how to vote. Since there can be no Section 14(a) liability without materiality, this allegation is defective. *See TSC Industries*, 426 U.S. at 449; *Stahl*, 967 F.2d at 337.

IV.

We conclude that, even after three attempts, Desaigoudar has failed to state a claim because she failed to heed the district court's warning to comply with Rule 9(b) and the PSLRA. This subjected the complaint to the distinct possibility of dismissal with prejudice. *See Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) ("The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.") (quoting *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989); 15 U.S.C. § 78u-4(b)(3)(A) (mandating dismissal under the PSLRA for failure to plead adequately a securities fraud claim). Nevertheless, this court has decided that "dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 879 (9th Cir. 1999). It is clear that no amendment could save Desaigoudar's complaint. The district court is therefore

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

[Filed October 16, 1998]

No. C-97-21003-JW

AARATHI DESAIGOUDAR, as Trustee of The Chan Desaigoudar Foundation, a California charitable trust,
Plaintiff,

v.

WADE MEYERCORD; SCOTT HOVER-SMOOT; ANGEL JORDAN; JEFFREY KALB; C. KUMAR PATEL; STUART SCHUBE; JOHN SPRAGUE; and JOHN TREWIN,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS[1]

[1]This disposition is not appropriate for publication and may not be cited.

[Docket No. 30]

I. INTRODUCTION

On March 2, 1998, Defendants filed a motion to dismiss this action and noticed it for hearing on April 20, 1998. Due to the Court's unavailability the matter was renoticed to October 14, 1998. Based on all papers filed to date and the oral argument of the parties, the court grants the motion to dismiss.

II. BACKGROUND

Plaintiff Aarathi Desaigoudar, in her capacity as the trustee of the Chan Desaigoudar Charitable Foundation (the "Foundation"), initiated a securities fraud action against the current and former officers and directors of California Micro Devices, Corp. ("CMD").

CMD, which is headquartered in Milpitas, California, sells microprocessors and related items. In 1997, CMD's sales revenues were approximately $33 million. The Foundation currently owns 72,580 shares of CMD stock approximately worth $372,000.00. The present action concerns CMD's sale of its interest in CellAccess, Inc., a company involved in developing asynchronous transfer mode ("ATM") technology. On September 15, 1994, CMD entered into a research and development contract with CellAccess. The contract provided that CMD would make monthly payments of $90,000.00 in exchange for a 56% interest in CellAccess. In April 1995, CMD discontinued making the required payments, thus relinquishing its 56% interest. In

November 1995, FORE Systems ("FORE"), a Pittsburgh, Pennsylvania company purchased CellAccess for $60 million.

On September 15, 1995, CMD was to conduct its annual shareholders meeting. The agenda included the re-election of the individual Defendants and a vote on a stock option plan for the benefit of the Defendants. In anticipation of the meeting, a proxy solicitation was posted on June 12, 1995, and a press release was issued on July 27, 1995. The materials reported that CMD had earned a $1.5 million profit and emphasized that it was the first time in two years the company had achieved a quarterly profit.

In the Second Amended Complaint ("SAC"), Plaintiff alleges that the proxy solicitations and press release contained misstatements and omissions in violation of Section 14(a) of the Securities Exchange Act and Rule 14a-9 of the Securities Exchange Commission. The complaint asserts that Defendants failed to disclose that (1) the company's modest quarterly profit was the result of their decision to relinquish CMD's 56% interest in CellAccess, which would have earned the company $36 million under the November 1995 sale to FORE; and, (2) Defendant Angel Jordan had an alleged conflict of interest because he served with the President of FORE on the Pittsburgh High Technology Council, a trade council which works to attract high technology companies to Pittsburgh, Pennsylvania.

Defendants filed the present motion to dismiss the SAC for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that Plaintiff has failed to plead the substantive requirements of a Section 14(a) claim. The Court has granted Defendants' two previous

motions to dismiss with leave to amend the Section 14(a) claim. In the Court's last order Plaintiff was cautioned "in preparing a second complaint, Plaintiff must adhere to the strict requirements of Rule 9(b) and the Private Securities Litigation Reform Act . . . Repeated failure to comply with these pleading requirements will result in dismissal of the claim, with prejudice."

III. LEGAL STANDARD

In ruling on a motion to dismiss, the court must accept as true all allegations of material fact and must construe said allegations in the light most favorable to the non-moving party. Western Reserve Oil & Gas Co. v. New, 765 F.2d 1428, 1430 (9th Cir. 1985). Any existing ambiguities must be resolved in favor of the pleading. Walling v. Beverly Enterprises, 476 F.2d 393, 396 (9th Cir. 1973). However, fraud claims must be pleaded with particularity and courts have become especially demanding in securities fraud litigation. Romani v. Shearson Lehman Hutton, 929 .2d 875, 878 (1st Cir. 1991). "A complaint . . . . should serve to seek redress for a wrong, not to find one." Segal v. Gordon, 467 F.2d 602, 607-08 (2nd Cir. 1972). With these standards in mind, the court now reviews the allegations contained in plaintiffs consolidated complaint.

The Plaintiff must plead the elements of a Rule 14a-9 claim with sufficient particularity as required by Federal Rule of Civil Procedure 9(b). Maywalt v. Parker & Parsley Petroleum Co., 808 F.Supp. 1037, 1055 (S.D.N.Y. 1992) ("the standards of Rule 9(b) apply to the pleading of Rule 14a-9 claims"); Hershey v. MNC Financial, Inc., 774 F.Supp. 367, 374-375 (D.Md. 1991).

IV. DISCUSSION

A. Section 14(a)

Section 14(a) of the Securities Exchange Act of 1934 was enacted to "prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964).

Section 14(a) provides:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect to any security.

15 U.S.C. Section 78n(a).

The SEC regulation governing Section 14(a), 17 C.F.R. section 240.14a-9 provides:

> No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication written or oral, containing any

> statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material act necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

To establish a cause of action for violation of Rule 14a-9 a plaintiff must establish that: (1) the proxy solicitation at issue contained false or misleading statements of material fact, or omitted to state a material fact necessary to make the statements factually accurate; (2) the misstatement or omission of material fact was made knowingly, recklessly, or negligently; and (3) the proxy solicitation was an essential link in effectuating the proposed transaction. Halpern v. Armstrong, 491 F.Supp. 365, 378 (S.D.N.Y. 1980); In re Westinghouse Securities Litigation, 832 F.Supp. 989, 1000 (W.D.Pa. 1993).

As noted above these elements must be pled with sufficient particularity. Maywalt v. Parker & Parsley Petroleum Co., 808 F.Supp. 1037, 1055 (S.D.N.Y. 1992); Hershey v. MNC Fin. Inc., 774 F.Supp. 367, 374-75 (D.Md. 1991).[2]

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[2]Plaintiff argues that application of Rule 9(b) is improper because the complaint does not allege that Defendants violations

B. Material Misstatements and Omissions

1. Value of CellAccess

The Supreme Court has stated that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." TSC Industries Inc. v. Northway, 426 U.S. 438, 449 (1976).

Plaintiff alleges that Defendants should have informed shareholders that CMD's reported $1.5 million profit was at the cost of a $36 million dollar profit, which CMD would have earned through FORE's acquisition of CellAccess. Plaintiff alleges that this information was material because the shareholders would have considered it important during the 1995 Shareholder Meeting, when they were scheduled to vote on the re-election of Defendants and the adoption of a proposed stock option plan created for the benefit of Defendants.

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were fraudulent. The Court finds Plaintiff's position disingenuous in light of the express language in the complaint: "Plaintiff brings this action . . . to enjoin a continuing fraudulent scheme by Defendant," "Defendants obtained . . . their corporate positions by intentionally and repeatedly withholding material information," and "intentionally and repeatedly making material misrepresentations." (SAC ¶1) (emphasis added). "Defendants knowingly or intentionally engaged in a pattern of fraud," "Defendants have made solicitations . . . intentionally or knowingly containing statements that . . . were false and misleading," and "Defendants have knowingly or intentionally omitted to state material facts." (SAC ¶81) (emphasis added). Thus, Rule 9(b) is applicable.

Rule 14a-9 precludes issuance of proxy solicitations containing statements and omissions which were false or misleading "at the time . . . made." 17 C.F.R. Section 240.14a-9 (emphasis added). The Rule does not impose upon corporate officers and directors the ability to read into the future. In Smallwood v. Pearl Brewing Company, 489 F.2d 579, 602 (5th Cir. 1974), the Court properly noted that: "We require those who draw up proxy statements to be fair and sensitive to the needs of shareholders in exercising their rights of corporate suffrage. But we do not require that the writers of proxy statements be clairvoyant." In fact predications and estimates are disfavored by the S.E.C. South Coast Services Corp. v. Santa Ana Valley Irrigation Co., 669 F.2d 1265, 1270 (9th Cir. 1982).

Plaintiff's allegations fail to meet the materiality requirement of Rule 14a-9. Defendants reported a $1.5 million profit for CMD in June and July 1995. CellAccess was purchased by FORE several months later in November 1995 for $60 million. During the Summer of 1995 Defendants could not have predicted that FORE would acquire CellAccess for $60 million, thus earning CMD a $36 million profit if Defendants had retained its 56% interest in CellAccess. The crux of Plaintiff's complaint is that Defendants omitted to include an estimate of CellAccess's resale value. Under Rule 14a-9 failure to disclose an estimate is not a material omission because courts recognize the uncertainty of estimates and the tendency of shareholders to place undue reliance upon them. Id. at 1270-1271 ("Both the courts and the S.E.C. have consistently discouraged the inclusion of appraised asset valuations in proxy materials."). Information which is uncertain cannot be deemed "important in deciding how to vote."

The court in South Coast Services stated that inclusion of an estimate is proper when it is "objective, reasonably certain data, such as commodity prices prevailing in an active market." Id. In the case at bar, Plaintiff fails to allege that Defendants had any estimates or for that matter reasonably certain data on CellAccess's market value. Thus, Defendants' omission of the data was proper.

2. Angel Jordan

Plaintiff also alleges that Defendants violated Rule 14a-9 by failing to disclose that both Defendant Jordan and Eric Cooper, the President of FORE, are directors of the Pittsburgh High Technology Council. Plaintiff argues that the information was material because it revealed Jordan's conflict of interest, which "placed him in concert with the party who ended up with the Company's most valuable asset." (Plaintiff's Opposition, p. 1).

However, Plaintiff fails to allege with particularity any facts which would indicate why Mr. Jordan and Mr. Cooper's shared directorship created a conflict of interest. The complaint contains no facts demonstrating that Mr. Jordan either personally or financially benefited from FORE's acquisition of CellAccess. Thus, Mr. Jordan's position on the Technology Council was not material under Rule 14a-9 and was properly omitted.

C. Knowingly, Recklessly or Negligently

The second aspect of a Rule 14a-9 claim requires plaintiffs to demonstrate that the omissions were made knowingly, recklessly or negligently. Under the Private

Securities Litigation Reform Act, plaintiffs are required "with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. §78u-4(b)(2).

Plaintiff claims that Defendants were aware of CellAccess's worth because in January 1995 CellAccess received national recogniton for developing an important new technology, and in March 1995 CellAccess was recognized in a high technology publication as a promising new company. Plaintiff states that the same publication reported that a competitor of CellAccess had been purchased by CISCO Systems for $120 million.

Plaintiff's conclusory allegations are again insufficient. Plaintiff fails to identify the publications she refers to and whether they were ever seen or read by the Defendants. Moreover, she fails to identify the portions of the March 1995 article from which Defendants could conclude that CellAccess was worth at least $60 million. Since Plaintiff fails to allege any facts from which Defendants could reasonably estimate the potential value of CellAccess, she has failed to plead that the omissions at issue were made either knowingly, recklessly or negligently.

D. Causation

The final element of a Rule 14a-9 claim is causation. "Where there has been a finding of materiality a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if . . . he proves that the proxy solicitation itself, rather than the

particular defect in the solicitation materials, was an essential link in the accomplishment of transaction." Mills v. Electric Auto-Lite Company, 296 U.S. 375, 385 (1970). Since Plaintiff has failed to properly plead materiality, the Court does not need to address causation.

E. Dismissal with Prejudice

Due to Plaintiff's failure to sufficiently plead the elements of a Rule 14a-9 claim, the Court finds it appropriate to grant the Defendants' motion to dismiss. The Court also finds it appropriate to dismiss the matter with prejudice since Plaintiff has failed to state a claim on three separate occasions. See Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990) ("The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.") (quoting Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1990)).

V. CONCLUSION

Based upon the foregoing, the Court grants Defendants' motion to dismiss with prejudice.

DATED: October 15, 1998

/s/_____
JAMES WARE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed December 22, 2000]

No. 98-17154
DC# CV-97-21003-JW
Northern District of California

AARATHI DESAIGOUDAR, as Trustee of the Chan Desaigoudar Charitable Foundation, a California charitable trust, *Plaintiff-Appellant,*	)
v.	)
WADE MEYERCORD; SCOTT HOVER-SMOOT; ANGEL JORDAN; JEFFREY KALB; C. KUMAR PATEL; STUART SCHUBE; JOHN SPRAGUE; and JOHN TREWIN, *Defendants-Appellees.*	)

ORDER

Before: SCHROEDER, Chief Judge; SNEED and TASHIMA, Circuit Judges

The panel has voted to deny appellant's petition for rehearing. Chief Judge Schroeder and Judge Tashima vote to deny the petition for rehearing en banc, and Judge Sneed so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and for rehearing en banc is denied.

Supreme Court, U.S.
FILED
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CLERK

No. 00-1453

IN THE

Supreme Court of the United States

AARATHI DESAIGOUDAR, as Trustee of the
CHAN DESAIGOUDAR FOUNDATION,
a California Charitable Trust,

Petitioner,

v.

WADE MEYERCORD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

Is a statement in a proxy solicitation concerning the disclosure of a corporate director's other directorships that might be in violation of Item 401(e)(2) of Regulation S-K (17 C.F.R. § 229.401(e)(2)) material as a matter of law under Section 14(a) of the Securities and Exchange Act of 1934 (15 U.S.C. § 78n(a)) and Securities and Exchange Commission Rule 14-a (17 C.F.R. § 240.14a-9)?

Does an allegation of a possible misstatement in a proxy solicitation concerning a corporate director's other directorships effectively allege a *per se* violation of Section 14(a) of the Securities and Exchange Act of 1934 (15 U.S.C. § 78n(a)) and Securities and Exchange Commission Rule 14-a (17 C.F.R. § 240.14a-9)?

TABLE OF CONTENTS

Page

Restatement of Questions Presented i

Table of Contents ii

Table of Cited Authorities iv

Statutory Provisions 1

Statement of the Case 3

A. Procedural History. 3

B. Nature Of The Case. 5

Reasons for Denying the Writ 6

A. Pleading A Claim Under Section 14(a) And Rule 14a-9. 7

1. Elements Of A Claim Under Section 14(a) And Rule 14a-9. 7

2. Materiality Under Section 14(a) And Rule 14a-9. 8

B. Regulation S-K Does Not Supplant The Materiality Requirements Under Section 14(a). 9

Contents

Page

C. The Second Amended Complaint Did Not Allege That Angel Jordan's Directorship At Keithley Was Material, Or Even False, Under Section 14(a). 11

D. Information Concerning Jordan's Directorship At Keithley Was Not Material As A Matter Of Law. 12

E. The Second Amended Complaint Also Failed To Allege Other Key Elements Of A Section 14(a) Claim. 13

Conclusion 14

TABLE OF CITED AUTHORITIES

Page

Cases:

Alfus v. Pyramid Tech. Corp., 764 F. Supp. 598 (N.D. Cal. 1991) 10

Desaigoudar v. Meyercord, 223 F.3d 1020 (9th Cir. 2000) 5

Herskowitz v. Nutri/System, Inc., 857 F.2d 179 (3d Cir. 1988), *cert. denied*, 489 U.S. 1054 (1989) 8

J.I. Case Co. v. Borak, 377 U.S. 426, 84 S. Ct. 1555 (1964) 8

Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S. Ct. 616 (1970) 8

Oran v. Stafford, 226 F.3d 275 (3d Cir. 2000) 10, 12

TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 96 S. Ct. 2126 (1976) 8, 9, 12

Statutes:

15 U.S.C. § 78j(b) 4

15 U.S.C. § 78n(a) ..... *passim*

15 U.S.C. § 78u-4 ..... 2, 4

Cited Authorities

	Page
15 U.S.C. § 78u-4(b)(1)	8
15 U.S.C. § 78u-4(b)(2)	8, 13
Rules:	
Federal Rule of Civil Procedure 9(b)	4
Federal Rule of Civil Procedure 11	4
Other Authorities:	
17 C.F.R. § 229.401	9, 10, 11
17 C.F.R. § 229.401(a)	10, 11
17 C.F.R. § 229.401(e)	11
17 C.F.R. § 229.401(e)(2)	i, 6, 9, 12
17 C.F.R. § 240.10b-5	4, 10
17 C.F.R. § 240.14a-9	*passim*
17 C.F.R § 240.14a-101	1, 9, 11

STATUTORY PROVISIONS

In addition to the statutory provisions set forth in the Petition, the following provisions are relevant.

1. 17 C.F.R § 240.14a-101 ("Schedule 14A"), which provides in pertinent part:

> Item 7. Directors and executive officers. If action is to be taken with respect to the election of directors, furnish the following information in tabular form to the extent practicable. If, however, the solicitation is made on behalf of persons other than the registrant, the information required need be furnished only as to nominees of the persons making the solicitation.
>
> (a) The information required by instruction 4 to Item 103 of Regulation S-K (§ 229.103 of this chapter) with respect to directors and executive officers.
>
> (b) The information required by Items 401, 404(a) and (c), and 405 of Regulation S-K (§ 229.401, § 229.404 and § 229.405 of this chapter).

2. 17 C.F.R. § 240.14a-9 ("Rule 14a-9"), which provides in pertinent part:

> (a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any

> statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

3. 15 U.S.C. § 78u-4 (the "Private Securities Litigation Reform Act" or "PSLRA"), which provides in pertinent part:

> (b) Requirements for securities fraud actions
>
> (1) Misleading statements and omissions
>
> In any private action arising under this chapter in which the plaintiff alleges that the defendant —
>
> (A) made an untrue statement of a material fact; or
>
> (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;
>
> the complaint shall specify each statement alleged to have been

misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(2) Required state of mind

In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

STATEMENT OF THE CASE

A. Procedural History.

Petitioner Aarathi Desaigoudar ("Petitioner") filed the original Complaint in this action in the United States District Court for the Northern District of California, San Francisco Division, on September 15, 1997, where the case was initially assigned to District Court Judge Samuel Conti (Case No. C-97-03379 SC). On October 8, 1997, Defendants and Respondents ("Respondents") filed a Motion to Transfer the case to the Northern District's San Jose Division. District Judge Conti granted the unopposed Motion to Transfer. Once at the San Jose Division, the case was assigned to District Court Judge James Ware.

On October 8, 1997, Respondents also filed a Motion to Dismiss for Failure to State a Claim ("Original Motion to Dismiss"). Petitioner proffered an "Amended Complaint" as an attachment to the Opposition to the Original Motion to Dismiss. The Court made its determination on the Original Motion to Dismiss in light of Petitioner's proffered Amended Complaint.

In the January 14, 1998 Order Dismissing Complaint, the district court dismissed, without leave to amend, Petitioner's claim under Section 10(b) of the Securities and Exchange act of 1934 (15 U.S.C. § 78j(b)) and Securities and Exchange Commission ("SEC") Rule 10b-5 (17 C.F.R. § 240.10b-5). The district court dismissed, with leave to amend, Petitioner's claim for alleged misrepresentation or omissions under Section 14(a) of the Securities and Exchange Act of 1934 (15 U.S.C. § 78n(a)) and SEC Rule 14a-9 (17 C.F.R. § 240.14a-9). The district court cautioned, however, that Petitioner's amended pleading needed to adhere to the strict requirements of Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act ("PSLRA") (15 U.S.C. § 78u-4), as well as with the requirements of Federal Rule of Civil Procedure 11.

On February 12, 1998, Petitioner filed another Amended Complaint, which featured the third iteration on Petitioner's Section 14(a) claim. Respondents and the Court, as a result, referred to the "Amended Complaint" as the "Second Amended Complaint." Respondents brought a Motion to Dismiss the Second Amended Complaint on March 2, 1998, which was heard by the district court on October 14, 1998. Subsequently, the district court granted the Motion to Dismiss without leave to amend on October 16, 1998.

Petitioner filed a Notice of Appeal to the Ninth Circuit Court of Appeal on November 9, 1998. The Court of Appeal heard oral argument on February 17, 2000. The Court of Appeal filed its opinion affirming the district court's Order Granting Defendants' Motion to Dismiss on September 8, 2000. *See* Petition Appendix A; *see also Desaigoudar v. Meyercord*, 223 F.3d 1020 (9th Cir. 2000). Petitioner filed a Motion to Stay Mandate Pending the Filing of a Petition for Writ of Certiorari in the Supreme Court on January 2, 2001, which was granted by the Court of Appeal on January 12, 2001. Petitioner also filed a Petition for Rehearing and for Rehearing En Banc on or about October 10, 2000. This petition, which raised the same argument concerning the representation that Respondent Angel Jordan was a director of Keithley Instruments, Inc. ("Keithley") that Petitioner has raised in the Petition for Writ of Certiorari, was denied by the Court of Appeal on December 22, 2000.

B. Nature Of The Case.

In the Second Amended Complaint, Petitioner alleged that Respondents, who are current and former officers and directors of California Micro Devices Corporation ("CMD"), purportedly violated Section 14(a) and Rule 14a-9 by failing to inform CMD shareholders, pursuant to a proxy solicitation, that CMD had disposed of its investment in a company called CellAccess Technology, Inc. ("CellAccess") for less than its alleged value. Petitioner also alleged that Petitioners violated Section 14(a) and Rule 14a-9 by failing to disclose duties of Defendant and Respondent Angel Jordan with respect to his position on the Pittsburgh High Technology Council, which Petitioner alleged created some kind of conflict of interest.

In the section of the Second Amended Complaint identifying the parties, Petitioner also mentioned in passing that CMD's March 3, 1995 10-K filing represented that Respondent Jordan was a director of Keithley, but noted that Keithley's December 1995 10-K filing did not list Respondent Jordan as a director. Although Petitioner's Second Amended Complaint made much of Respondent Jordan's participation on the Pittsburgh High Technology Council, no further mention of his directorship, or lack thereof, at Keithley was made in the Second Amended Complaint. The Court of Appeals held that the Second Amended Complaint failed to include any allegations showing the materiality of alleged misrepresentations concerning Respondent Jordan's directorship at Keithley. *See* Petition Appendix B at 13a-14a.

REASONS FOR DENYING THE WRIT

Plaintiff and Petitioner Aarathi Desaigoudar petitions this Court for a Writ of Certiorari on the grounds that the decision by the Ninth Circuit Court of Appeal affirming the district court order dismissing Petitioner's Second Amended Complaint with prejudice failed to apply the correct standard of materiality to an alleged misrepresentation in the 1995 proxy solicitations for CMD. Specifically, Petitioner argues that the Court incorrectly held that the information in the proxy solicitations regarding Defendant and Respondent Angel Jordan's affiliation with Keithley was immaterial as a matter of law because the representation at issue was purportedly in violation of the requirements in Regulation S-K concerning the disclosure of directorships (17 C.F.R. § 229.401(e)(2)).

Petitioner's arguments in support of a Writ of Certiorari fail on several accounts. First, the Second Amended Complaint failed to plead any facts establishing the materiality of the

information concerning Jordan's affiliation with Keithley to any shareholder voting decision at issue in the Second Amended Complaint. Second, even if the materiality of this information was somehow in question, the Second Amended Complaint failed to include allegations setting forth the other elements of a claim under Section 14(a) of the Securities and Exchange Act of 1934 (the "Exchange Act"). Particularly given the pleading requirements under the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), the Court of Appeals' decision that, after giving Petitioner three chances to state a claim under Section 14(a), the district court was correct to dismiss the Second Amended Complaint with prejudice was correct. Accordingly, this Court need not review the well reasoned decision of the Court of Appeal and should instead deny the Petition for Writ of Certiorari.

A. Pleading A Claim Under Section 14(a) And Rule 14a-9.

1. Elements Of A Claim Under Section 14(a) And Rule 14a-9.

Section 14(a) of the Exchange Act provides that

> it shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or . . . otherwise, in contravention of such rules and regulations as the Commission may prescribe . . . , to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security.

The corresponding SEC Rule 14a-9 prohibits the solicitation of proxies through statements or omissions of material fact that are false or misleading when made. 17 C.F.R. § 240.14a-9.

Section 14(a) is intended to "prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *J.I. Case Co. v. Borak*, 377 U.S. 426, 431, 84 S. Ct. 1555 (1964).

To make out a claim under Section 14(a) and Rule 14a-9, a plaintiff must demonstrate that the alleged proxy solicitation contained a false or misleading statement of *material* fact, or omitted to state a *material* fact necessary to make the statement in the solicitation not false or misleading. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 440, 96 S. Ct. 2126 (1976). A plaintiff must also show that the misstatement or omission of a material fact was the result of knowing, reckless or negligent conduct. *See, e.g., Herskowitz v. Nutri/System, Inc.*, 857 F.2d 179, 189-90 (3d Cir. 1988), *cert. denied*, 489 U.S. 1054 (1989). Finally, a plaintiff must demonstrate "transaction causation" — that the proxy solicitation itself was an "essential link" in the accomplishment of the transaction at issue. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 385, 90 S. Ct. 616 (1970). Moreover, a plaintiff must also plead the elements of falsity and scienter with the particularity required under the PSLRA. 15 U.S.C. § 78u-4(b)(1)-(2).

2. Materiality Under Section 14(a) And Rule 14a-9.

Courts evaluating materiality under Section 14(a) make an "objective" determination "involving the significance of an omitted or misrepresented fact to a reasonable investor." *TSC Indus.*, 426 U.S. at 445. Accordingly, a fact omitted from a proxy statement "is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.* at 449. This standard

requires that a plaintiff show that there is "substantial likelihood that, *under all the circumstances*, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder," i.e., that the information would have "significantly altered the 'total mix' of information made available." *Id.* (emphasis added).

B. Regulation S-K Does Not Supplant The Materiality Requirements Under Section 14(a).

The essence of Petitioner's argument is that the requirements under Regulation S-K (17 C.F.R. § 229.401) regarding required disclosures in proxy solicitations pursuant to Schedule 14A (17 C.F.R. § 240.14a-101) supplant the requirements of materiality that otherwise govern claims under Section 14(a) and Rule 14a-9.[1] Not surprisingly, Petitioner cites to no authority for the premise that disclosures required under Regulation S-K or Schedule 14A are somehow exempt from the materiality requirements set forth both on the face of Rule 14-a[2] and in this Court's own decisions.

---

1. In the Petition for Writ of Certiorari, Petitioner does not raise the question of whether litigants have a private cause of action that arises solely under Item 401(e)(2) of Regulation S-K, as opposed to arising under Section 14(a) or other securities laws providing for private causes of action. Likewise, Petitioner never raised this issue with either the district court or Court of Appeals. Accordingly, this Court need not address this issue in ruling on the Petition.

2. 17 C.F.R. § 240.14a-9 ("Rule 14a-9") provides that:

> (a) No solicitation subject to this regulation shall be made by means of any proxy statement . . . containing any statement which, at the time and in the light of the

(Cont'd)

In a decision addressing the materiality of disclosures mandated by Item 303 of Regulation S-K with respect to a claim under Rule 10b-5 (17 C.F.R. § 240.10b-5), the Third Circuit held that the " 'the demonstration of a violation of the disclosure requirements of Item 303 does not lead inevitably to the conclusion that such disclosure would be required under Rule 10b-5 [because] [s]uch a duty to disclose must be separately shown.' " *Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000) (quoting from *Alfus v. Pyramid Tech. Corp.*, 764 F. Supp. 598, 608 (N.D. Cal. 1991)). As a result, the Third Circuit in *Oran* held that "a violation of SK-303's reporting requirements does not automatically give rise to a material omission under Rule 10b-5." 226 F.3d at 288.

The same reasoning applies to a disclosure required under Item 401 of Regulation S-K and the materiality requirements for stating a claim under Section 14(a) and Rule 14a-9. The mere fact that a disclosure violated Item 401 of Regulation S-K, or that it *might have violated* this regulation as in the present case, does not necessarily make the particular disclosure material with respect to a proxy solicitation. To find otherwise would lead invariably to absurd results. For instance, Item 401(a) of Regulation S-K mandates the disclosure of the ages of corporate directors.

(Cont'd)

> circumstances under which it is made, is false or misleading with respect to any *material fact*, or which omits to state any *material fact* necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy. . . .

(Emphasis added.)

17 C.F.R. § 229.401(a). If a proxy statement were to misstate the age of a director, there is no reason to assume that shareholders would consider the information relevant to each and every issue up for shareholder vote.

C. The Second Amended Complaint Did Not Allege That Angel Jordan's Directorship At Keithley Was Material, Or Even False, Under Section 14(a).

The Second Amended Complaint alleged that CMD's March 1995 Form 10-K filing — not even the proxy statement itself — described Respondent Jordan as a director of Keithley. Petitioner alleged that Keithley's own Form 10-K in December 1995 did not list Respondent Jordan as a director, but Petitioner did not allege that Jordan was not, in fact, a director of Keithley as of March 1995. Likewise, Petitioner did not allege in the Second Amended Complaint that CMD shareholders considered information concerning Jordan's directorship at Keithley in deciding how to vote, or even that a hypothetical "reasonable shareholder" would have done so. Further, Petitioner did not even allege that CMD's Form 10-K formed any part of CMD's 1995 proxy solicitation or was otherwise considered by shareholders in determining how to vote on any matters up for shareholder approval in 1995.

As the Second Amended Complaint does not allege that any misstatements concerning Angel Jordan's affiliation, or lack thereof, with Keithley appeared in the 1995 proxy statement, Item 401(e) of Regulation S-K is irrelevant to the evaluation of Petitioner's allegations. Although Schedule 14A (17 C.F.R. § 240.14a-101) does require that certain information listed in Item 401 of Regulation S-K (17 C.F.R. § 229.401) be included in a proxy statement, the Second

Amended Complaint does not even allege that the 1995 proxy statement itself failed to contain accurate information concerning Jordan's directorships.

D. Information Concerning Jordan's Directorship At Keithley Was Not Material As A Matter Of Law.

Even had the Second Amended Complaint alleged that the 1995 proxy statement contained inaccurate information concerning Jordan's directorship at Keithley, the Second Amended Complaint nonetheless had no allegations establishing the materiality of such information. The gravamen of the Second Amended Complaint was that the Defendants failed to disclose information concerning CMD's disposition of its investment in CellAccess in the 1995 proxy solicitations in order to obtain shareholder approval of a stock option plan. Nowhere did the Second Amended Complaint make any connection between approval of the stock option plan and biographical information concerning Respondent Jordan.

Likewise, the mere fact that Item 401(e)(2) of Regulation S-K requires disclosure of directorships does not automatically render such information material to a particular shareholder vote. *See Oran*, 226 F.3d at 287-88. As this Court made clear in *TSC Industries*, specific information in proxy solicitations is to be viewed in its context as part of the "total mix" of information before the shareholders. 426 U.S. at 449. There was simply nothing in the Second Amended Complaint to support even a weak inference that Respondent Jordan's directorship at Keithley in any way affected the decision of CMD shareholders to approve the stock option plan or to take any other action.[3]

3. The only conceivable relevance of Jordan's professional affiliations would be to his election as a director. The Second (Cont'd)

E. The Second Amended Complaint Also Failed To Allege Other Key Elements Of A Section 14(a) Claim.

Even had the Second Amended Complaint managed to allege that the information concerning Jordan's affiliations was material to CMD's shareholders in approving the stock option plan in 1995, the claim would nonetheless have failed as Petitioner did not allege other key elements of a claim under Section 14(a). For instance, the Second Amended Complaint does not allege that information concerning Jordan's affiliation with Keithley was false at the time of the June/July 1995 proxy solicitation as there was nothing in the Second Amended Complaint indicating that he was not a director of that company in March 1995, only that a December 1995 filing indicates that he was not. Likewise, the Second Amended Complaint did not allege who, among the defendants, was responsible for any statements concerning Jordan in the proxy solicitations or elsewhere, or that any such misrepresentations were made with the requisite scienter. Under the PLSRA, plaintiffs seeking relief under Section 14(a) and Rule 14a-9 cannot only make bare allegations of scienter, but must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).

The Court of Appeals found not only that Petitioner's Second Amended Complaint had failed to plead a

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Amended Complaint alleged no such connection or materiality, however, and *did not even challenge CMD's 1995 election of directors*. Even if the Second Amended Complaint had waged such a challenge, it would be necessarily moot as more than five years have now passed and subsequent elections of directors have already taken place.

Section 14(a) claim, but that "no amendment could save Desaigoudar's complaint." Petition Appendix A at 14a. Accordingly, this Court need not review the discrete issue put forward by the Petition for Writ of Certiorari as even a resolution of said issue in Petitioner's favor would not ultimately result in a change in the Court of Appeals' decision affirming dismissal with prejudice.

CONCLUSION

For the reasons set forth above, this Court should deny Petitioner Aarathi Desaigoudar's Petition for Writ of Certiorari.

Respectfully submitted,

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